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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN SANTOSKY II and ANNIE SANTOSKY,

Petitioners,

vs.

BERNHARDT S. KRAMER, Commissioner, ULSTER COUNTY DEPARTMENT OF SOCIAL SERVICES, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

POINT I

NOTWITHSTANDING THE COURT'S DECISION IN LASSITER v. DEPARTMENT OF SOCIAL SERVICES, TERMINATION OF PARENTAL RIGHTS BASED UPON A PREPONDERANCE OF EVIDENCE VIOLATES DUE PROCESS OF LAW.

Since petitioners' brief was submitted this Court decided *Lassiter v. Department of Social Services,* 452 U.S. ____, 68 L.Ed.2d 640 (1981). Respondent has concluded from his reading of *Lassiter* that since a termination of parental rights "proceeding does not concern physical freedom, a fundamental liberty interest is not at issue." Brief for Respondent, p. 11. In fact, in *Lassiter* this Court re-emphasized the truism that a parent's right to his or her children is an extremely important constitutional right. 68 L.Ed.2d at 649-650 and 652. As Justice Blackman's dissent observed, the interest a parent has in his or her children "occupies a unique place in our legal culture. . .and. . .[is] more significant and priceless than 'liberties which derive merely from shifting economic arrangements.' " 68 L.Ed.2d at 656-657 (citations omitted). Justice Blackman was able to cite a host of cases to support the conclusion that parents' rights have "been viewed as a fundamental liberty interest worthy of protection under the Fourteenth Amendment." 68 L.Ed.2d at 657. Justice Stevens, also in dissent, characterized loss of parental rights as "more grievous" than mere incarceration. 68 L.Ed.2d at 670.

The Court reached its conclusion that counsel is not automatically required in termination proceedings only

because it determined that there is a "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." 68 L.Ed.2d at 649. Against this presumption the Court held that due process is satisfied by leaving "the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review." 68 L.Ed.2d at 652.

Petitioners submit that no like presumption exists in standard of proof cases or, alternatively, that if such a presumption does exist, proper analysis requires a higher standard of proof than preponderance of evidence in termination proceedings.

A. Standard Of Proof Cases Do Not Turn On Loss of Physical Liberty.

Counsel cases decided before *Lassiter* had explicitly held that counsel is required only when one loses physical liberty. In *Scott v. Illinois,* 440 U.S. 367 (1979) this Court ruled that counsel is not required in criminal proceedings unless the accused suffers actual imprisonment. Unlike in counsel cases, case law demonstrates that the issue of physical liberty is not the determinative factor in standard of proof cases.

Perhaps the strongest demonstration of this is the Court's reasoning in *Vance v. Terrazas,* 444 U.S. 252 (1980). In *Terrazas* the Court did not hold that citizens had to overcome any presumption in challenging the standard of proof in expatriation cases. Instead, the Court engaged in a careful analysis of the factors involved and, focusing on the heavy substantive burden placed on the government, con-

cluded that the preponderance of evidence standard was constitutionally acceptable.

In *In re Winship*, 397 U.S. 358 (1970), the Court emphasized two factors in determining that proof beyond a reasonable doubt is required in delinquency proceedings. These factors were loss of physical liberty and stigmatization. 397 U.S. 363. However, Winship did not hold that only juveniles who are deprived of their liberty are entitled to a higher standard of proof. Proof of wrongdoing beyond a reasonable doubt is required in all delinquency proceedings whether or not the delinquent actually is deprived of his physical liberty. *Cf. Taylor v. Kentucky*, 436 U.S. 478 (1978).

Finally, although adverse findings in *Addington v. Texas*, 441 U.S. 418 (1980) necessarily involve loss of physical liberty, in requiring clear and convincing evidence in civil commitment proceedings, the Court emphasized equally deprivation of physical liberty and the adverse social consequences which flow from a finding that an individual needs to be committed to a mental health facility. 441 U.S. at 425-26. *Cf. Vitek v. Jones*, 445 U.S. 480 (1980).

B. The Preponderance Of Evidence Standard Is Constitutionally Deficient In Termination Cases.

Even if there is a presumption of constitutionality in standard of proof cases unless a person risks loss of physical liberty, the preponderance of evidence standard in termination of parental rights proceedings is constitutionally offensive. As Justice Blackman observed in *Lassiter*, "(i)t is not disputed that state intervention to terminate the relationship between petitioner and her child must be accomplished

by procedures meeting the requisites of the Due Process Clause." 68 L.Ed.2d at 656 (dissenting).

For purposes of providing counsel, this Court has held that due process may or may not require counsel in any given case. Case by case review of the need for counsel has precedential roots. *See, e.g., Betts v. Brady,* 316 U.S. 455 (1942); *Gagnon v. Scarpelli,* 411 U.S. 778 (1973). Courts know how to evaluate the fundamental fairness of a proceeding and stand ready to reverse upon review at the appellate level when the absence of counsel if found to be unfair. As Justice Powell, with Justice Rhenquist joining, observed in *Argersinger v. Hamlin,* 407 U.S. 25, 63-67 (1972), by taking into account "the complexity of the offense charged" and "factors peculiar to each case," including the individual's competence to present his own case, "the sensitivity and diligence of individual judges" and the existence of a defense, appellate courts can decide whether fundamental fairness in a trial has been observed.

However, in standard of proof cases, allocation of risk necessarily must be calibrated in advance. No similar mechanism for case by case review is possible in standard of proof cases. The question posed by this case is whether due process is served when parental rights are severed based on evidence which established merely that the existence of certain facts was more probable than their non-existence. This is either fundamentally fair or it is not.

The Court has recognized that "(a) parent's interest in the accuracy and justice of the decision to terminate his or her parental status is. . .a commanding one" and an interest, in fact, shared by the state. *Lassiter v. Department of Social Services,* 68 L.Ed.2d at 650. Counsel may be unnecessary in every case to assure "the accuracy and justice of the

decision."* Raising the standard of proof can never be said to be unnecessary. Whenever a decision to terminate parental rights is based on a mere preponderance of evidence, "the accuracy and justice of the decision" is suspect. The parent's and state's interests in an accurate and just decision is constant and is assured only by requiring evidence which convinces the finding of fact by greater than a preponderance of evidence.

POINT II

THE GOVERNMENTAL BURDEN TO PROVE PERMANENT NEGLECT IS NOT HEAVY.

Recognizing that the difficulty of the government's substantive burden is an important factor in determining the constitutionality of section 622 of the New York Family Court Act, respondent suggests that the government's burden in permanent neglect cases is very heavy. Brief for Respondent, pp. 44-47. This contention is clearly wrong on a brief look at the statute and relevant case law demonstrates.

In the first full paragraph on p. 45 of respondent's brief it is suggested that "the primary focus of §384-b(4)(d) is *prospective*." However the plain language of the statute shows this to be simply untrue. To find permanent neglect, a court is to look at *past* conduct of the parent, not to predict

*Among the factors listed to support the decision in *Lassiter* is that findings of fact in North Carolina must "be based on clear, cogent and convincing evidence." North Carolina Gen. Stat. §7A-289.30. 68 L.Ed.2d at 651.

future conduct. The party seeking to terminate parental rights must show that for a period of one year after the placement of their children, the parents failed substantially and continuously or repeatedly to maintain contact with their children or plan for their future. Family Court Act §614(d). Once it has been established that the parents failed to maintain contact or plan in the past, the statutory standard is met. No inferences need be made as to whether the parents might accomplish a plan in the future.

Permanent neglect as a ground to terminate parental rights must be distinguished from other statutory grounds including abandonment and mental illness. *See* Social Services Law § §384-b(4)(b) and (c). Thus cases such as *Matter of Cory L. v. Martin L.*, 45 N.Y.2d 383, 408 N.Y.S.2d 439 (1978), relied upon by respondent, have no bearing on this case except to serve as a sharp contrast with permanent neglect. Under New York substantive law, abandonment cannot be found without demonstrating a "purposeful ridding of parental rights - a withholding of interest, presence, affection, care and support." 45 N.Y.2d at 391, 408 N.Y.S.2d at 443. This stands in sharp contrast with permanent neglect.

Respondent continues his argument by suggesting that the state must show a negative state of mind to be successful in a permanent neglect case. Brief for Respondent, p. 45. The words of the statute again show this to be patently false. In defining "failure to plan," the statute expressly provides that *good faith effort shall not of itself, be determinative.*" Social Services Law §384-b(7) (c) (emphasis supplied). Case law underscores the backward looking nature of inquiry. The New York Court of Appeals has held:

> To be sure, the mother has evinced a 'burning desire' to regain custody of the child, but it is undisputed that in

> the three years she failed to take the affirmative steps necessary to insure that Orlando would be the rightful beneficiary of an adequate home life if returned to her.

Matter of Orlando F., 40 N.Y.2d 103, 110, 386 N.Y.S.2d 64, 67 (1976).

If section 384-b(4) is prospective at all, the prospective determination is not an individual one but one which has been made by the Legislature. Effectively this section constitutes a legislative inference that if parents fail to maintain contact or to plan for a year, there is a sufficient likelihood that they will not do so in the future. Respondent recognizes this by stating that "(t)he law assumes that if a parent fails to make any progress in one year it is more likely than not that he will be unable to change in time to successfully reunite the family. This is a sound legislative judgment. . ." Brief for Respondent, p. 47. Petitioners do not dispute this contention and are not challenging this standard. This case addresses the degree of certainty necessary to find there was a failure to plan.

Rather than having a heavy burden, an agency is able to prove permanent neglect by extremely subjective proof making the agency's task decidedly easier, not more difficult. As already demonstrated in the Brief for Petitioners at p. 27,

> under New York law a court may terminate parental rights where it finds by a preponderance of evidence that a) the absence of diligent efforts by an agency to reunite the parent and child was excusable as not being in the child's best interests and b) even though the parents have maintained contact or planned for the future of the child in good faith, there was an absence of 'concerned parenthood' or the plan was not 'realistic.'

Commendably, respondent admits that the risk of error is highest in permanent neglect proceedings over all other termination actions in New York. Brief for Respondent, pp.

41, 44. Such proceedings need a higher standard of proof than preponderance of evidence to assure that when the momentous decision to terminate is made, it is very likely correct.

Respondent also acknowledges that even after termination is ordered, permanency — the only legitimate state interest in terminating in the first place — is reached slightly over half the time. Brief for Respondent, p. 47. By respondent's own admission, the social utility in making it easy to free children for adoption is realized in only a preponderance of the time. In such circumstances, the state's interest in helping children is not heavy. In a substantial number of cases (some 9000 children out of 20,000) termination was more harmful to the children than helpful. *See* Respondent's Exhibit 17.

In this case, the trial court permanently severed petitioners' parental rights based on evidence which was found only to be more likely right than wrong. The Constitution requires more.

CONCLUSION

For the above-stated reasons, petitioners pray that the judgment and order of the Supreme Court of the State of New York, Appellate Division, Third Department be reversed.

Respectfully submitted,

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